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A PSEUDO DOCTRINE AMBIGUOUSLY LABELED "THE FLEXIBILITY OF LAW."

"The Outlook" for December 17, 1910, in an editorial under the title "The Flexibility of Law," devotes itself both to the attempt to show that such a thing exists and that it is the necessary concomitant of progress. There seemed all the confusion in the mind of the writer of that editorial that was to be expected from the choice of its title.

What is "the flexibility of law?" Does this mean that its principles, though true and paramount, will accommodate themselves to particular circumstances and then become what they were before?

Or does it mean that they will bend and bend and bend in interpretation to fit those circumstances, in accordance with some supposed need by courts, so that there is amendment of the original law by the judicial department of government? Who knows of either "flexibility" (and what other can there be) in any civilized government? Especially who may say any such quality exists in the law of this country?

There did exist some similitude to this quality in the growth of the common law, but there was no such quality itself. This similitude existed because law grew out of decision and not because decision grew out of law. Decision sometimes originated custom and custom came to have the force of law. When, however, statute intervened, it overturned both, and, thereafter, decision interpreted the statute. As long as the statute remained unrepealed, the law it brought into being continued, and this decision presupposed.

It is this idea that the mind of the writer on "the flexibility of law" has failed to grasp, as the following language shows: "In our judgment, the real Constitution of the United States, the Constitution under which we are living, the Constitution to which the decisions of all our subordinate courts must conform, the Constitution to which all legislative acts, whether state or national, are subject, is not the written Constitution which was formed in 1787. It is that written Constitution *plus* the decisions of the Supreme Court of the United States interpreting and applying it, and the habit of the nation which has grown up under it."

There is little to be said about the last clause in what we have quoted, further than that it refers to an intangible sort of thing upon which no one can place his finger. For the other factor of the "*plus*" quantity, there is an assumption of that which may not at all exist, and the statement of the factor itself involves a contradiction in terms. One does not add to, or detract from a law in interpreting it, and the author of the editorial will look in vain for any decision of the Supreme Court where so indefensible an attempt is acknowledged or avowed. He can find abundant assertion in decisions of the Supreme Court, both direct and implied, about what was intended by the framers of the Constitution to be expressed.

The Supreme Court, as interpreter of the Constitution, has looked to history prior to and contemporaneously with the Constitution and it has consulted language used in debates, all for the purpose of ascertaining what our forefathers meant. When our great court, sworn to support that Constitution, came to a conclusion as to what they meant, it declared that a part of our Constitution, without jot or tittle of change, except as amendment has changed it.

But the vice particularly lurking in the excerpt we produce is the implication in

the statement that subordinate courts and legislatures only are under the dominion of the Constitution. Why "subordinate courts" only and not the Supreme Court also? Where and when did the author of that editorial learn that the Supreme Court, the solemn oath of its members to the contrary notwithstanding, was not obligated to conform to the Constitution?

Does he prove it by such a puerile statement, as he makes about a judge changing his mind about the constitutionality of the income tax? That judge said and those who agreed with him said, that ever since the Constitution was framed an income tax was, and would continue to be, while the Constitution remained unchanged, unconstitutional.

The editorial says: "What makes such a tax unconstitutional is the Supreme Court's decision interpreting the Constitution." Behold here the same confusion of thought as before. It is unconstitutional because of what the Constitution said and says and the Supreme Court declared it never could have been constitutional. Such a remark as we have just quoted implies, that because its author disagreed in opinion with the court, therefore, an income tax was, up to the time the decision referred to was rendered, constitutional. If his conclusion is wrong, the illustration would lose whatever of point it claims.

But can the author of the editorial refer to a single decision of the Supreme Court concerning which he can more than speculate that a constitutional provision, except as influenced by prior decision, would have been differently construed, if passed upon at some other period in our history? Can he say that Chief Justice Marshall would have decided differently had he passed upon the questions involved either at an earlier or later date? Or can he say, that, had his associates been different, they would have disagreed with him? And even if he could, inasmuch as the Constitution has to be construed, can he say, that the Supreme Court sworn to obey the Constitution, would not be paltering with its oath, if it does not try to say what the Constitution meant in 1787 and apply that meaning?

The author mistakes application to new conditions for "flexibility." We say there is a deposit of principle in the Constitution. Its broad terms were thus made so as to run *pari passu* with the growth of the government, whose sheet anchor it shall continue to be, until the states coming under its aegis elect to change it.

In nothing in that Constitution is anything more indubitably expressed, than that there shall exist three separate and independent departments, and that for law only to one of two sources should the people look—for additional constitutional law to the people—for statute law to the Congress. No one will contend that we may look to the Supreme Court for statute law. How far more opposed to the genius of our government is it to say that we may look to it for that which overrides statute law?

How inane is it to say that the Constitution was "made by the habit of the people?" That "habit" is called "a habit of acquiescence," and it is sought to be illustrated by the protest against supposed assertion by the Supreme Court of "power to determine authoritatively whether a legislative act is constitutional." The protest died away, but we think if it had been persisted in, to the extent of resistance, that same Supreme Court could have determined whether the resistance amounted to treason, insurrection or rebellion. If so, the "habit of acquiescence" more rightly may be called obedience to law.

We do not know who is the author of the editorial we are criticising, but, if it is an exposition of the doctrine of the right to extend the Constitution by construction, it ought to be challenged, as we have endeavored to do. The common law has been praised, not because its principles are flexible, but because the justice in them reaches out to changing conditions under a newer civilization. It is not flexible any more than the command, "Thou shalt not bear false witness," is flexible, because it may cover a form of slander of which the Israelites were unaware.

NOTES OF IMPORTANT DECISIONS

PLEADING AND PRACTICE—AMENDING AD DAMNUM CLAUSE BINDING ON SURETY ON RETURN BOND IN REPLEVIN.—The case of Bierce v. Waterhouse, 31 Sup. Ct. 241, on writ of error to the Supreme Court of Hawaii presents the questions above indicated.

It seems that in a prior case (Bierce v. Hawkins Trustee, 205 U. S. 340) the supreme court reversed the Supreme Court of Hawaii, which reversal had its effect in a judgment in replevin against defendant, the principal in a return bond in replevin.

Upon the surety being sued on the return bond the trial court held that as the ad damnum clause had been changed by amendment from $15,000 to $22,000 and judgment was rendered after the territorial courts had been reversed for the latter amount, he claimed that the necessary legal effect of the amendment was to relieve the surety on the return bond. The trial court held against this contention, but this holding was reversed by the Hawaiian Supreme Court. The Federal Supreme Court reversed the Hawaiian Supreme, and sustained the trial, court.

It is said as to this: "The only possible objection lay in the question whether the plaintiff was estopped from laying the damages in excess of the value of the property stated in the original complaint or affidavit. There are cases which hold that, in the replevin action, the plaintiff having himself fixed the value of the property claimed by an affidavit, is estopped thereby from showing that it is of less value, if he failed in his suit, though defendant may show if he can, that it was of greater value. * * * But we are not disposed to think that a plaintiff in such a suit may not show, especially when, as here, the defendant upon a return bond was suffered to retain the possession, that he had mistakenly undervalued the property." Then the court goes on to observe that: "One who becomes a surety for the performance of the judgment of a court in a pending case is represented by his principal and is bound by the judgment against his principal within the limits of his obligation." Further along it is said that this principle is subject to there being no fraud or collusion.

It is easy to perceive that the principal could be made to respond for whatever might be the actual value of the property, the possession of which he retains by virtue of the return bond. Certainly, however, a surety upon such bond is advised at the time he goes upon the bond that the plaintiff claims its actual value does not exceed that stated both in the original ad damnum clause and in the affidavit to obtain a writ of replevin. By stating an undervaluation his own bond is reduced—presumably a benefit to himself—and both defendant and his surety are led to execute a bond to retain possession. If plaintiff had stated $22,000 in his affidavit, defendant might have been content with this as an admission and have cheerfully surrendered possession. Plaintiff, however, avoided such admission, until defendant having elected to retain possession, there was no danger in making it, or at least this was greatly minimized.

We are in the situation of the court in not finding any authority precisely in point, but it is easy to see that a surety might be misled by an undervaluation in an affidavit, without which no writ for possession could issue at all. This writ and the bond behind it are the proximate cause of the return bond and we do not see why a plaintiff could thus be allowed to bind himself in no way as to value when to prosecute his suit he must swear to value. A surety on plaintiff's bond it seems to us, would not stand in so favorable a light as one on a return bond, because defendant would not, then, have committed himself on the question of value.

Another question also referred to was whether, as against the surety, the reversal by the Federal Supreme Court of the Hawaiian Supreme Court of the judgment rendered by the latter in favor of the principal on the return bond was operative, because when the opinion in the case was filed there was no right of appeal to the Federal Supreme Court and the law authorizing such appeal went into effect while a petition for rehearing, which was denied, was pending. After this denial final judgment was rendered by Hawaiian Supreme Court.

It was said: "Since there was no final judgment prior to the going into effect of the Act of Congress of March 3d, 1905 the pending litigation was subject to the power of Congress to allow a review after final judgment, although no such review had theretofore been admissible. No fundamental right was thereby denied, and the bond must be regarded as having been entered into subject to such change in remedy or procedure as did not change the contractual rights of the parties."

This ruling resembles somewhat that in Illinois C. R. Co. v. Kentucky, 31 Sup. Ct. 95, criticised in 72 Cent. L. J. 58, but it is conceivable that this ruling might stand though the other would not. It seems to us that

if a petition for rehearing is denied, the denial ought to relate back, as certainly it does relate back if it is granted. Where it is denied, the court in substance says: Our judgment, as rendered stands, and we pronounce the attempt to open it wholly abortive. It is not so much a question of power by Congress as what Congress intended.

CURATIVE STATUTES — EFFECT OF LEGISLATION TO VALIDATE CONTRACTS WHICH HAVE BEEN ADJUDGED INVALID. —In 1874 an act was passed which provided that no foreign corporation should do business until it should have complied with certain provisions and later there was added the requirement that it should register in the office of the auditor general annually certain statements. Decisions of Pennsylvania court were that all business transactions without compliance by a foreign corporation with these statutes were unlawful. A federal circuit court ruled that non-registration by a corporation which had sued, authorized a judgment in favor of defendant. Later the Pennsylvania legislature passed an act validating contracts declared unlawful because of these statutes. This corporation again brought suit, this time in the state court, and it was claimed that under the faith and credit clause of the constitution the federal circuit court judgment should be given effect as a bar to the new suit. West Side Belt R. Co. v. Pittsburg Construction Co., 31 Sup. Ct. 193.

The opinion by Justice McKenna notices the ruling of the state supreme court, that the validating "act makes no distinction between contracts which have been litigated and those which have not been litigated," and notices what it said about the circuit court judgment not being rendered upon the controversy between the parties but "based exclusively on the plaintiff's disability to maintain the action," because of non-compliance with Pennsylvania statutes. Therefore, there was no principle of res judicata at stake.

But the faith and credit clause was invoked to protect a judgment in favor of the defendant in a suit upon the same contract.

Justice McKenna cites several cases of the supreme court where curative acts were sustained where it was claimed their effect was to divest "vested rights and to impair the obligation of a contract." One showed that an act validating deeds of married women was used to avoid a judgment in ejectment rendered against a party because of a defect in a deed relied on for title. Watson v. Mercer, 8 Pet. 88. In another ejectment case title was cured after a former judgment. Satterlee v. Matthewson, 2 Pet. 380. In two later cases mortgages were validated by curative statutes. Gross v. Mortg. Co., 108 U. S. 477; Ewell v. Daggs, ibid. 143. In the latter case it was said by Justice Matthews, "that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains in fieri and not realized by having passed into a completed transaction, may by a subsequent statute be taken away."

Nothing apears here as to any one except original parties and all that is definitely decided is that in faith and credit cases one can look behind the judgment to the entire record to see what was adjudicated and adjudication, in respect to such clause, does not prevent what was in fieri from being still so considered.

CONSTITUTIONAL LAW — PENALIZING INSURANCE COMPANIES FOR BELONGING TO TARIFF ASSOCIATION TO FIX RATES. —The Supreme Court deems it the exercise of a minor power by the state, which can forbid combination among insurance companies to fix rates, to provide that in case of loss the insured may recover an additional per cent. and upon liability arising under a policy. German Alliance Ins. Co. v. Hale, 31 Sup. Ct. 246.

Justice Harlan, sustaining the view of Alabama Supreme Court, says: "We can well understand that fire insurance companies, acting together may have owners of property practically at their mercy in the matter of rates, and may have it in their power to deprive the public generally of the advantages flowing from competition between rival organizations engaged in the business of fire insurance. In order to meet the ends of such combinations or associations, the state is competent to adopt appropriate regulations that will tend to substitute competition in the place of combination or monoply. Regulations having a real, substantial relation to that end, and which are not essentially arbitrary cannot properly be characterized as a deprivation of property without due process of law."

While it is true a regulation of this kind has its aim to displace combination and substitute competition, it may be seriously questioned whether it really can generally achieve such a result. The Justice says: "Those means may not be the best that could have been desired, but the court cannot, for any such reason, declare them illegal or beyond the power of the state to establish."

The essence of this decision is that the state under its police power may tentatively proceed to accomplish competition or in any way to diminish combination that is hostile to it, and so long as the problem is being fairly assailed the due process of law clause will not interfere.

The reason why, as it seems to us, such penalizing cannot greatly succeed is that if recoveries are added to by 25 per cent, the rate-making associations will equalize this, both by increasing the margin between value of property insured and amount of insurance applied for and increasing the rates. It is true the gap would be widened a little for non-traffic association companies, but such a statute rather resembles a paper pellet against an armor of steel. It, however, may be tentatively right and therefore, under the shelter of the police power, which seems getting greatly beyond the reach of the 14th Amendment, if, indeed, it seems less immune as regards the interstate commerce clause.

ARIZONA'S CONSTITUTION—THE INITIATIVE, THE REFERENDUM, THE RECALL—IS THE CONSTITUTION REPUBLICAN IN FORM?*

The Constitutional Convention of the proposed State of Arizona, which was provided for by an Act of Congress, is now a thing of the past, and the work of the Convention is before Congress for ratification or rejection.

That it was the duty of the Constitutional Convention to provide for a government republican in form, there can be no question, and that the average voter will give to the question, "Does the constitution provide for a government republican in form?" little or no consideration, is probably true. With these two propositions admitted, the wisdom of Congress in requiring, by proper provisions in the Enabling Act, that, before statehood should become an accomplished fact, Arizona's proposed Constitution should be submitted to both the President and to Congress for inspection, becomes clearly apparent—in order that additional judgment may be had regarding some of the proposed "so-called advance ideas," that find place in the instrument.

If the Constitution, as drafted and submitted to the voters of Arizona, voices the majority sentiment of the people of that commonwealth, then certainly the people of Arizona are thoroughly inoculated with the sentiment that "our form of government is too far removed from the people, and that the interests rule"; and to check this a representative form of government should, at least, partially give way to a Socialistic Democracy, for, in my judgment, that is the form of government Arizona is attempting to establish.

With the proposed mixed form of Socialistic Democracy I am finding no fault, providing those in authority can discover that the terms of the Enabling Act have been fully complied with, and that the submitted Constitution is not in conflict with Section Four of Article Four of the United States Constitution, which reads as follows: "The United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion, and on application of the Legislature, or of the Executive when the Legislature can not be convened, against domestic violence."

If the Constitution submitted is republican in form and fully complies with the terms of the Enabling Act, and is ratified by the people, then only one result should follow, to-wit: Statehood.

Is the submitted Constitution republican in form?

Section One of Article Three of the proposed Constitution entitled, Legislative Department. Initiative and Referendum, in part reads as follows:

"The legislative authority of the state shall be vested in a Legislature, consisting of a Senate and a House of Representatives, but the people reserve the power to propose laws and amendments to the Constitution, and to enact or reject such laws and amend-

*This article represents the views of that large class of lawyers who believe that the initiative, referendum and recall establish a pure democracy and a government not republican in form as guaranteed by the constitution. We shall have the opposite contention presented in an early issue by Senator Bourne, of Oregon, but, in the meantime, we should be glad to know the sentiments of the profession on this subject.

ments at the polls, independent of the Legislature; and they also reserve, for use at their own option, the power to approve or reject, at the polls, any Act, or item, section, or part of any Act of the Legislature."

"The first of these reserved powers is the Initiative. Under this power ten per centum of the qualified electors shall have the right to propose any measure, and fifteen per centum shall have the right to propose any amendment to the Constitution."

"The second of these reserved powers is the Referendum. Under this power the Legislature, or five per cent of the qualified electors, may order the submission to the people at the polls of any measure, or item, section, or part of any measure, enacted by the Legislature, except laws immediately necessary for the preservation of the public peace, health, or safety, etc., etc."

* * * * * * *

"The veto power shall not extend to Initiative or Referendum measures approved by a majority of the qualified electors." And then under Article Six, entitled, "Removal from Office, Recall of Public Officers," Section One provides:

"Every public officer in the State of Arizona, holding an elective office, either by election or appointment, is subject to recall from such office by the qualified electors of the electoral district from which candidates are elected to such office * * * * and a petition containing twenty-five per centum of the vote cast at the last general election will set the machinery of removal into operation."

The above are portions of some of the more radical features of Arizona's proposed constitution. This brings us to the question, "What Constitutes a Republican Form of Government?"

Webster says: "A republican form of government is one in which the people select those who are to make the laws, and is radically different from a pure democracy in which the people collectively and as their own original act, make the laws, and whenever, under our American system of republican government, a state undertakes to destroy the representative system, and install in its place, as the law-making power, the people, either acting in mass meetings or enacting laws by ballot in their original capacity, it undertakes to do an unconstitutional thing, which is void." "A Republic is a State in which the sovereign power resides in a whole body of the people, is exercised by representatives selected by them—a State, a Commonwealth, in which the exercise of the Sovereign power is lodged in representatives elected by the people. In modern usage it differs from a Democracy or democratic State in which the people exercise the powers of Sovereignty in person."

If this definition of republic and republican form of government is to be taken as the standard, then Arizona is attempting to establish a democracy within the boundaries of this federal republic, for Section One of Article Three, Legislative Department, Initiative and Referendum, deprives the legislative body of every vestige of power to legislate. The section so declares in unqualified terms;—see the last three lines of Paragraph One of the above Section One, which read as follows:

"And they (referring to the people) also reserve, for their own option, the power to approve or reject at the polls any Act, or item, section, or part of any Act of the Legislature, and they reserve the power to propose laws and to enact such laws, independent of the Legislature as they desire."

The above powers reserved to the people destroy every vestige of power of the legislature and render Arizona a democracy, if Webster's definition is correct. Every bill that can be formulated into law by the legislature can be undone by the people en masse, or by initiative petition, which amounts to the same thing, and en masse they can perform every act possible for the legislature to do, unless it be to confirm some of the governor's political appointments, thereby bringing the reserved powers strictly within the rule of the above definition, of undertaking to do "an unconstitutional thing."

It is true, the makers of the proposed instrument attempt to dodge the blow by

enacting, "This section shall not be construed to deprive the legislature of the right to enact any measure," yet the section does exactly the things the makers say shall not be done, and the legislature, or legislative body, simply becomes a sterile thing—an excrescence, possibly ornamental, but useless.

Webster's Dictionary is not the only source for definition of "a republican form." The law writers have also attempted to say what constitutes such a government.

"A government administered by representatives chosen or appointed by the people or by their authority; a government by the people, through representatives appointed by them to various departments, executive, legislative, judicial, as provided either by direct vote or through some intervening officer or body by them selected and appointed by direct vote for the purpose; a government which derives all its power directly or indirectly from the great body of the people, and is administered by persons holding their offices through pleasure for a limited period, or during good behavior; a State in which the sovereign power resides in the whole body of the people, and is exercised by representatives selected by them."[1]

There is nothing in this definition indicating that laws enacted directly by the people, regardless of representatives, are laws emanating from a government republican in form.

In a pure democracy there were no representatives for legislative purposes, at least none were needed, for the supreme power, while lodged in the people was exercised by them collectively—"Such was the government of Athens."

Justice Harlan, of the present supreme court, in one sentence as crisp as celery, has thrown a flood of light on this question. In an address delivered in December, 1907, discussing our form of government, he said: "It is a representative republic in which the will of the people is to be ascertained in a prescribed mode, and carried into effect only by appointed agents, designated by the people themselves in the manner indicated by law."

There is no initiative or recall in this utterance, and no comfort for those who would destroy our form of government. The Supreme Court of the United States, in several opinions, has defined the term, "Republican Form of Government."

Duncan v. McCall was one of these cases. It arose in Maverick County, Texas. Dick McCall was indicted by the grand jury for the crime of murder; tried and found guilty. While the case was pending on appeal, he filed a petition for a writ of habeas corpus in the Circuit Court of the Western District of Texas, which court dismissed his petition; he then appealed to the Supreme Court of the United States, where the question was presented—"That he was deprived of his liberty, and was about to be deprived of his life, in violation of the Constitution of the United States"; incidentally the question arose as to what constituted a republican form of government, and the court, through Chief Justice Fuller, said:

"By the constitution, a republican form of government is guaranteed to every state in the union, and the distinguishing feature of the form is the right of the people to choose their own officers for governmental administration, and pass their own laws *in virtue of the legislative power reposed in representative bodies,* whose legitimate acts may be said to be those of the people themselves; but while the people are themselves the source of political power, their governments, national and state, have been limited by written constitutions, and they have themselves thereby set bound to their own power as against the sudden impulses of mere majority."[2]

Another most interesting case was that of Minor v. Haffersett, opinion by Chief Justice Waite. Haffersett was a member of the registering board, and refused to register the name of Virginia L. Minor, a citizen of Missouri, as a lawful voter. She brought suit. A demurrer was directed

(1) Cyclopedia of Law & Procedure, Vol. 34, page 1622.

(2) See Duncan v. McCall, 139 U. S. 449; Lawyers Co-op. Ed. 35, p. 219.

against her petition and by the court sustained, and on error the cause was taken to the Supreme Court of the United States. Her contention was that a state that refused by its laws and constitution the right of suffrage to a woman, a citizen, was not republican in form, and its laws and constitution were in violation of the provisions of the United States Constitution pertaining to citizenship. And in passing on the question "When is a government republican in form," the court said:

"No particular government is designated as republican, neither is the exact form to be guaranteed in any manner designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended. The guaranty necessarily implies the duty on the part of the states themselves to provide such a government. All the states had governments when the constitution was adopted. In all, the people prescribed to some extent, through their representatives elected in a manner especially provided. These governments the constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the states to provide. Thus, we have unmistakable evidence of what was republican in form within the meaning of the term as employed in the constitution."[3]

From Andrews' American Law,[4] we learn, "Representation is an essential feature of a republic; power must be delegated or lie dormant."

"Representatives," for legislative purposes, surely are not "an essential feature" of the proposed government to be established in Arizona, for there the legislative body may never convene, and the people, en masse, through the initiative or referendum features can perform every legislative act of government necessary; and by the recall turn their agents out at will; and this no doubt, was the intention of the convention that framed the instrument, and going outside of what appears on paper, I personally know this to have been the expressed wish and intention of a large percentage of Arizona's voting population.

Walker's American Law is equally explicit and definite in language defining a government republican in form. George Tucker Curtis' Constitutional History of the United States,[5] says that, "one of the essentials of a government republican in form is, "that the will of the people is to be expressed through representative forms."

Of course, it must be admitted that Arizona has provided for a governor, and for judges; the one to enforce the laws, and the others to hear trials, and construe the laws; but under the Arizona provisions of the proposed constitution they can scarcely be denominated agents, nor, in the broad sense, representatives of the people for certain prescribed work, because they are forced by the recall to become a part of the mob and do its bidding. And the proposed State of Arizona is thus reduced to a socialistic autocracy, by which I mean a socialistic form of government in which "the power of the people, expressed by them at the polls, has no defined limits.

The presentation of the subject to the present point has quite generally been limited to definitions containing essentials of the elements of a government republican in form, and to fortify that which has gone before, I call attention to the fact that when our government was in its formative period, discussion was had in which some of the questions now at issue were carefully considered and studiously avoided.

None of the original thirteen states contained anything in their charters or constitutions at the time the United States Constitution was framed and accepted, that approached the ideas of the initiative, referendum and recall provisions of the Arizona instrument. That our forefathers and framers of the United States Constitution well understood the weak features and lack of stability of pure democracies, or governments in which the essentials of democracy predominate over representative forms,

(3) Minor v. Hoffersett, 21 Wallace, 175.
(4) Page 191.
(5) Vol. 1, Chap. 32.

there can be no doubt, for the proof is most abundant, consequently their statements regarding the form of a government they understood was being established, should have much weight now as aids to guide us in arriving at correct conclusions as to what was really meant by a government republican in form when no form was prescribed.

With the numerous examples of the lack of stability of pure democracies before them, the framers of the United States Constitution gave us a representative form of government, called a republic, and now that the difference between this form and that of a democracy as previously understood by us may be made clearer, I call attention to some of the statements by Madison, easily found by reference to the Federalist. In the Tenth Essay he said:

"A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect and provides the cure for which we are seeking. Let us examine the points in which it varies from pure democracy and we shall comprehend both the nature of the cure and the efficiency which it must derive from the union. The two great points of difference between a democracy and a republic are, *first*, the delegation of the government in the latter form to a small number of citizens elected by the rest; *secondly*, the greater number of citizens and greater sphere of country over which the latter may extend. The effect of the first difference is on the one hand to refine and enlarge the public views by passing them through the medium of a chosen body of citizens whose wisdom may best discern the true interests of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation it may well happen that the public voice pronounced by the representatives of the people will be more consonant to public good than if pronounced by the people themselves, convened for the purpose."

"Democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property."

Arizona proposes to pronounce the "public voice" through the people themselves, and has arranged the machinery of government to that end, and that the "public voice" may at all times be heeded and the agents of the people quickened into continually keeping the ear sharpened to public rumor and the pulse of some of the people, regardless of conditions that may or might exist, a recall provision, applying to all officers of the state and county, is made one of the chief instruments or "implements" of the constitution.

The recall may be a good provision. It may be a very bad one, and while I personally know the people of Arizona to be as law-abiding as any in the union, I think I can conceive of a condition when the initiative, the referendum, as framed into the Arizona instrument, and the recall features, would be very detrimental to the public peace and welfare of the proposed state.

To illustrate: There are several communities in Arizona in which the employed largely exceed the employers; where the non-property holders outnumber the property holders. Suppose a labor strike, arising out of a difference between the mine owners and the miners, should be declared, and that conditions of the Cripple Creek trouble, which is fresh in our memories, where men were illegally deported, should be duplicated; and then, suppose that suits should be commenced, or habeas corpus proceedings, instituted, and conditions and facts were such that in the suits instituted the strikers were at fault, and the court should so find. At once initiative petitions would, or, at least, could be circulated throughout the state and signers procured to change the law on which the opinion was based. Recall petitions would be in the hands of excited men and women, and during a moment of passion and hatred, while reason of the public was dethroned, an honest, fearless judge would be voted out of office and a demagogue elected, devoid of

qualifications, but sworn to carry out the wishes of the strikers, and the state law be so changed as to do away with the force of the decision. Under such conditions would the rights of property be safeguarded and people made more secure in their homes, and the stability and credit of the state improved? This supposed case, of course, may never arise.

Our form of government was patterned after the British System, in which the representative idea has been prevalent for hundreds of years, and when we framed the Constitution of the United States this representative idea became as fixed in principle as the stars are fixed in their positions in the universe, eternal—everlasting. Socialistic ideas had no place in our form of government; these were an afterthought. They are fruit from foreign seed, the growth of which depends on the initiative and recall and their extended use. There were no initiative, no referendum, no recall provisions in any of the state or colonial charters at the time the United States Constitution was adopted. We inherited the representative form of government the same as we inherited the common law. The representative system is part and parcel of our national system as a sovereign and free people who do not act through the aggregate community but through representatives of the community for the states, the source of all political power being in the people themselves, there being no absolute power under this system of checks and reserves.

We would hardly feel that justice had been done this subject were we to fail to call attention to the learned and eloquent argument by Webster in the Door case, in which he took such a wide sweep and threw such a flood of legal and historic light into the question—"the source from whence came our representative system in our form of government." Door, with others, attempted to change the constitution or charter of the State of Rhode Island, and the people en masse undertook the work. Door was arrested and charged with treason. In the discussion of the case Webster admitted the correctness of the position of the opposition in this—"that the case involved the consideration and discussion of the true principles of government in our American system of public liberty" and, in part, said:

"Our American liberty, allow me to say, has an ancestry, a pedigree, a history. Our ancestors brought to this continent all that was valuable, in their judgment, in the political institutions of England, and left behind them all that was without value. * * * When the United States separated from England by the declaration of 1776, they departed from the political maxims and examples of the mother country, and entered upon a course more exclusively American. From that day down, our institutions and our history relate to ourselves. Through the period of the Declaration of Independence, of the convention, and the adoption of the constitution, all our public acts are records out of which a knowledge of our system of American liberty is to be drawn. * * * The people no longer owed allegiance to crowned heads. * * * Where the form of government was already well enough, they let it alone; where reform was necessary they reformed it. What was valuable they retained. What was essential they added, and no more. Through the whole proceedings from 1776 to the latest period, the whole course of American public acts, the whole progress of this American system was marked by a peculiar conservatism. The object was to do what was necessary, and no more, and to do that with the utmost temperance and prudence. * * * Legislation is a sovereign power and exercised by the United States government to a certain extent, and also by the states according to the forms which they themselves have established, and subject to the provisions of the Constitution of the United States. * * * The next principle is that the exercise of legislative power and the other powers of government immediately by the people themselves is impracticable; they must be exercised by *representatives* of the people."

When we adopted the Constitution of the United States we voluntarily limited our power as states,—we surrendered our individual sovereignty, if we had any. We conferred authority on the general government to guarantee each state a republican form of government with representative features—and not a socialistic democratic form—and this guaranty was a limitation on the states, and in substance equal to a command or agreement on the part of the states to do their duty, and act along republican lines, and legislate through representatives selected for that purpose.

From the standpoint of the political stump orator the *sovereign power* of the people, with no checks or limitations, is a nice theory, but it never existed in fact in this country. "The power to even vote is a delegated and not an original power, as is evidenced by the fact that it nowhere exists, except as conferred by law, and instead of being recognized in history as the inalienable human right, it is one of the latest gifts of modern civilization."

The People v. Cullins.[6]

So far I have attempted to present the source, the ancestry, of our legislative system of government, and to make clear at least the fact that under the limitations of Section 4 of Article 4, of the Constitution of the United States, the states themselves must exercise authority through constitutions or governments republican in form, and not otherwise. Now, does the Constitution of Arizona fill the requirement? The question is one that is open for discussion and decision. Oregon has passed upon the initiative and referendum features of its constitution, and held that the initiative and referendum did not destroy the representative character of its state government, that the people "had simply reserved to themselves a larger share of legislative power." The reasoning in the case can hardly be called satisfactory, even from the standpoint of the court rendering the opinion, for there seems to be an element of doubt running through the decision.[7]

The decision seems to be based on the one fact that the legislative branch of government still lives, thereby admitting this legislative feature essential to constitute a government republican in form. Surely then, the legislative power exercised en masse, or in the whole state, by initiative petition, is in contravention to Section 4, Article 4, of the United States Constitution, to the extent exercised beyond local matters, even according to the Oregon theory, if properly carried to logical conclusions.

Some light is shed on the question in the case of "In re Pfahler," decided by the Supreme Court of California.[8] From the reading of this case it seems that the City of Los Angeles has adopted the initiative as a part of the plan of its city government. Pfahler was arrested for violation of one of the initiated city ordinances, and by habeas corpus proceedings sought relief on the ground that the "Initiated Ordinance" was repugnant to the state constitution, also to Section 4, Article 4, of the United States Constitution. The Supreme Court of California said: "The contention here is necessarily that any attempt by a state to provide for a direct exercise of legislative power by the people * * * even in local affairs, is inconsistent with the republican form of government guaranteed by this provision, * * * and ineffectual for any purpose, * * *" and held, "for all the purposes of this proceeding it is sufficient to hold—as we do—that it does not prohibit the direct exercise of legislative powers by the people of a subdivision of a state, strictly in local affairs."

This decision was based on the theory that at the time the United States Constitution was adopted the various states permitted the local communities to govern themselves by the old town-meeting plan, and "these governments the constitution did

(6) 3 Mich. Rep. 343.

(7) Kadderby v. City of Portland, 44 Oregon 118, 76 Pac. Rep. 72nd.

(8) 150 Cal. 71, 88 Pac. 270.

not change," but that "they were accepted precisely as they were, and it is therefore presumed that they were such as it was the duty of the state to provide," and because the court was not aware that any suggestion has ever been made that this "town form" of local government is prohibited by the federal constitution, it concluded it was the intention of the framers of the Constitution of the United States that this form was in full compliance.

This decision does not attempt to pass on the authority of the people of a state to do away with the necessity for a legislative body, the same as Arizona has done, but bases its reasoning and conclusions on the one fact—"The New England town government under which all the inhabitants in the town meeting exercised legislative power for local purposes" and that the legality of such town meetings had never been questioned."

To this opinion, however, there is a strong dissenting one by Justice McFarland in which he takes the position that even in local matters all legislation must be performed by bodies legislative in form, and says: "Every act done by a state which is inconsistent with and violative of the theory of a republican form of government is involved," and cites, Minor v. Hoffersett, 21 Wallace 162, where it is said: "The guaranty necessarily imposes a duty on the part of the states themselves to provide such a government."

Then the dissenting opinion propounds the question—"Now what is a republican form of government?" And answers the question as follows: "These words are not defined in the constitution itself. Like other words used in that instrument, we must look for their meaning to the general usual sources and authorities which determine the significance of English words and phrases. An examination of these sources leaves no doubt as to the meaning of the phrase in question. It is defined in the Federalist; in legislative debates; in judicial opinions; in text books of the law, and in the standard dictionaries of the languages." And then quotes from Webster's Dictionary as follows: "A State in which the sovereign power resides in the whole body of the people and is exercised by *representatives* selected by the people."[9]

This dissenting opinion is pointed, strong, clear, logical, and, in my opinion, is much more satisfactory than the Oregon decision, and seems to be largely based on correct principles and fortified with judicial opinions, definitions and text books of the law.[10]

If the validity of initiative provisions, as contemplated in the Arizona Constitution, has been discussed or passed upon in other cases than those of Kadderby v. The City of Portland, and, In re Pfahler, I have failed to find them, unless a brief reference in the 81 Minn. can be called a discussion. The case of Kadderby v. the City of Portland, then, stands alone—unsupported in principle, and as yet unsupported by any other expression, so far as the initiative is concerned when applied to an entire state.

The principle of the referendum, much limited in its scope to the referendum powers as practiced in Oregon and as *proposed* in the Arizona Constitution, has frequently been upheld, the referendum being resorted to in such questions as the location of county seats; the division of counties; the issuance of municipal bonds; in local option to restrict the liquor traffic; and in one instance, by congress itself, in receding that portion of the District of Columbia which previously had formed a part of Virginia, leaving it to the people to say whether the act should become effective.

These early referendum questions were all submitted to the people for their expression by legislative acts, by and through the legislative bodies in legal session, and not by the people direct through the peti-

(9) See 88 Pacific Reporter, page 280.

(10) In the Central Law Journal, Vol. 69, page 148, appears a splendid article on the Initiative and Referendum by one D. C. Allen. No authorities are cited, but the evils and dangers of the system are forcibly pointed out.

tion method. The power of a legislature to make laws contingent on the people ratifying the same, is now well settled. The doctrine has been carried to the extent of the law taking effect on the happening of certain events, and the courts have even said, "If the legislature makes it dependent, like the movements of the Roman armies under the guardianship of the Oracles, upon the flight of geese or the cackling of hens, it is constitutional."

The leading case on this principle of legislative referendum is that of Barto v. Himrod,[11] in which case the question was discussed generally as to whether a legislative body could submit a referendum law to the whole state at once, or whether it should be so drawn for local use that it be acted upon piecemeal by each community separately for local use, and then the question was discussed, if all the various communities of the state, acting locally, should act favorably along the same line, so the law in its local operation should be in effect in all parts of the state, whether then incorruption became corruption, and the whole act void and the court likened the proposition to "cutting a pig's tail off in four whacks is legal, and to sever it at one stroke, is illegal."

I think now the decisions are nearly, if not quite, uniform, to the effect that laws originating in legislative bodies to become effective on a favorable vote of the people, under proper laws, are legal and binding and constitutionally made.[12]

The reader will note that the Acts referred to in the foregoing opinions concerning "referended" laws, were Acts regularly passed by a legislative body and only to become laws contingent on the will of the people expressed at the polls, and not Acts such as are contemplated under the provisions of the Arizona Constitution. There is a distinction in the mode, at least.

In conclusion, I will briefly allude once more to the Oregon case of Kadderby v. the City of Portland, in which case the court said: "The government is still divided into legislative, executive and judicial departments."

Now, suppose the state has these departments of government, which are essentials to a republican form, but through the reserved powers in the people these departments exist only in name—their functions being destroyed as is being attempted in Arizona—is not that in effect a doing away with these departments—these essentials of a government republican in form?

Under the proposed Arizona Constitution, by and through the recall provision, it makes no difference whether an official is in the honest discharge and fearlessly performing the duties of his office, or not; if the people tire of him and decide they no longer desire the officer's services, a recall petition is set in motion; an election is held; a character is smirched; an office is vacated, and all this without any right of defense except to face the maddened populace on the hustings.

Judicial opinions are reviewed by the people by expelling or recalling the judge and in turn placing a pliant tool on the bench.

Legislative acts are vetoed by the referendum.

If the governor calls out the militia to put down riots, the riots are increased and encouraged by recalling the governor.

Is the proposed constitution for Arizona one calculated to render property safe and life secure, and is it republican in form?

We think not.

D. C. LEWIS.

Oklahoma City, Oklahoma.

(11) 4 Seld. 483.

(12) People v. Collins, 3 Michigan Reports, 343, Note; State v. Bolder, 38 Mo. 500.

SALES—GOOD WILL.

VON BREMEN et al. v. MacMONNIES et al.

Court of Appeals of New York, Nov. 22, 1910.

93 N. E. 186.

Where the good will of a business is transferred by the assignor's voluntary act and not by operation of law, the vendor may not thereafter compete with the purchaser, by soliciting trade from the customers of the old business, though he may sell to such customers without soliciting, though they were on a list of customers compiled by the old firm and abstracted by the vendor.

WILLARD BARTLETT, J.: On May 10, 1904, one of the plaintiffs, Henry Von Bremen, and the defendants Frank McMonnies and William Von Elm entered into a copartnership under the firm name of Henry Von Bremen & Co., subsequently changed to Von Bremen, MacMonnies & Co., for the transaction of an importing and commission business in buying, taking on commission, and selling all sorts of fancy groceries, which copartnership by the terms of the agreement was to continue until the 30th day of April, 1909. On February 10, 1909, the defendants sold to the plaintiff Henry Von Bremen "all their right, title, and interest in all the assets, good will, trade-marks, and other property of every name and nature wheresoever located of the firm of Von Bremen, MacMonnies & Co., together with all debts and things in action due or owing, by or from, any person or corporation to said firm." The consideration for this transfer was the payment of $44,000, which was $1,500 more than the book value of the property transferred. There was no specific valuation of the good will. The plaintiffs Henry Von Bremen and Herman T. Asche, under the firm name of Von Bremen, Asche & Co., have succeeded to the business thus purchased by the plaintiff Henry Von Bremen individually. Shortly after his purchase, the defendants formed a partnership under the firm name of MacMonnies & Von Elm for the transaction of a similar business in fancy groceries. In the competition which thus arose the defendants have done or threatened to do various acts which the plaintiffs contend have a tendency to lessen or destroy the good will of the business which they acquired from the defendants by means of the transfer which has been mentioned. The present suit was brought to enjoin such acts. The trial court, by its interlocutory judgment, granted a portion but not the whole of the relief for which the plaintiffs prayed. It enjoined the defendants from using the cable address of the old firm, which was "MacMonnies"; from using a list of 2,200 dealers in fancy groceries which had been compiled by the old firm; and from using labels, brands, trade-marks, bottles, tins, and other packages, such as were exclusively owned or controlled by the old firm. The interlocutory judgment also directed an accounting for the profits realized by the defendants and an assessment of the damages sustained by the plaintiffs.

Upon their appeal to the Appellate Division, the plaintiffs obtained some additional relief, but still not as much as they desired. The injunction granted at Special Term was extended so as to enjoin the defendants from soliciting the agency for the sale of articles of which the old firm had the exclusive agency and from soliciting orders for goods packed under special labels, trade-marks, and brands devised for the old firm for special customers. One member of the Appellate Division thought that the defendants should also be restrained from soliciting any of the customers of the old firm, but a majority of the court refused to go as far as this. The principal question presented by the plaintiffs' appeal to this court is whether the injunction should be thus extended.

The answer to this question depends upon the meaning to be given to the term "good will" in the transfer of the business of the old firm of Von Bremen, MacMonnies & Co., to the plaintiff Henry Von Bremen on February 10, 1909. If the law assigns a definite meaning to the term as used or implied in the voluntary transfer of a business, it must be presumed that such was its signification in this contract. We have to inquire then, what are the restraints which the law imposes upon the assignor of the good will of a business, who transfers the same voluntarily, and not as the result of bankruptcy proceedings or under like compulsion?

The principal definitions of good will were fully stated and discussed by Judge Vann in People ex rel. A. J. Johnson Co. v. Roberts, 159 N. Y. 70, 53 N. E. 685, 45 L. R. A. 126, and it is not necessary to repeat that statement or discussion here. Of all the noteworthy definitions the narrowest is probably that of Lord Eldon, who, in 1810, defined good will as "the

probability that the old customers will resort to the old place." Cruttwell v. Lye, 17 Vesey, Jr., 335, 346. On the other hand, one of the broadest definitions is that suggested in 1859 by Vice Chancellor Page-Wood, who declared that good will included "all that good disposition which customers entertain towards the house of business identified by the particular name or firm, and which may induce them to continue giving their custom to it.' Again, he said: "Good will must mean either advantage * * * that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on or with the name of the late firm or with any other matter carrying with it the benefit of the business." Churton v. Douglas, 2 M., D. & De G. 294.

Whatever definition of good will may be adopted, however, it appears to have been uniformly held that in case of a transfer thereof, the assignor, in the absence of an express agreement to the contrary, may carry on a similar business in the same locality. The question which has given most trouble to the courts in such cases has related to the right of the vendor of the good will to solicit business from the customers of the old firm. In England the controversy on this subject extends from the case of Labouchere v. Dawson (Law Reports 13 Equity 322), decided by Lord Romilly, Master of the Rolls, in 1872, to Trego v. Hunt (Law Reports, 1896 [Appeal Cases] 7), decided by the House of Lords in 1895. Labouchere v. Dawson was the case of a sale of a brewery business upon the death of one of two partners. The surviving partner set up business as a brewer—there being no stipulation to prevent him from so doing—and solicited orders from customers of the old firm. Lord Romilly held that although he might go into the brewing business himself and publicly advertise that business, he could not lawfully apply to any customer of the old firm, "either privately by letter, personally, or by a traveler, asking such customer to deal with the defendant and not with the plaintiffs." Another distinguished Master of the Rolls, Sir George Jessel, laid down the same rule in Ginesi v. Cooper & Co. (14 Chancery Division, 596), decided in 1880, and went still further, declaring that he was prepared to hold, if the question had been raised, that the assignor of the good will could not even deal with the customers of the old firm, although they came to him unsolicited. The same learned judge carried this view of the law into effect in a subsequent case (Leggott v. Barrett, 15 Chancery Division, 306), where he granted an injunction which forbade the vendor of a business not only from soliciting trade from the customers of the former firm, but also from dealing with such customers at all. The Court of Appeal, however, vacated the latter part of the injunction. Shortly afterward the same court held that the doctrine of Labouchere v. Dawson, supra, against the solicitation of business from customers of a former concern did not apply and should not be extended to cases of compulsory alienation, so that "if the assignees of a bankrupt sell his business and good will, the purchaser cannot restrain the bankrupt either from commencing a similar business himself or from soliciting his old customers to deal with him in his new business." Walker v. Mottram, 19 Chancery Division, 355.

Although the decision last cited apparently sanctioned the rule laid down in Labouchere v. Dawson, the doctrine of that case was distinctly overruled by two out of the three judges of the Court of Appeal (Baggallay and Cotton, L. JJ., against Lindley, L. J.) in Pearson v. Pearson (27 Chancery Division, 154), decided in 1884. The rule that the vendor of a partnership business may not solicit trade from the customers of the old firm was rejected and an injunction which had been granted prohibiting such solicitation was dissolved upon appeal. The law as thus declared remained unquestioned for more than 10 years. It was during this period that the case of Marcus Ward & Co. v. Ward, 15 N. Y. Supp, 913; was decided by the General Term of the Supreme Court in the First Department, expressly following Pearson v. Pearson as the latest expression of judical opinion in England on the subject. The question does not appear ever to have reached this court until now. It finally went to the House of Lords in 1895, in the case of Trego v. Hunt (Law Reports, 1896 [Appeal Cases] 7), where it received elaborate consideration in opinions by Lord Herschell, Lord Macnaghten, and Lord Davey, resulting in a disapproval of the decision of the Court of Appeal in Pearson v. Pearson and a restoration of the doctrine of Labouchere v. Dawson.

The substance of the decision of the House of Lords in Trego v. Hunt may be briefly stated. The sale of the good will of a business, even when the vendor himself is a party to the contract, does not impose upon him any obligation to refrain from carrying on a trade of the same nature as before. The obligations imposed upon the vendor in the case of the sale of the good will are not necessarily the same under all circumstances. Lord Herschell conceded it to be the settled law that whenever the good will of a business was sold the vendor did not, by reason only of that sale, come under a restriction not to carry on a competing business. In cases where a partnership has been dissolved by effuxion of time or death, he

thought it would be absurd to hold that those who formerly constituted the firm or their survivors should be restrained from carrying on what trade they pleased. But it does not follow "that because a man may by his acts invite all men to deal with him, and so amongst the rest of mankind invite the former customers of the firm, he may use the knowledge which he has acquired of what persons were customers of the old firm in order by an appeal to them, to seek to weaken their habit of dealing where they have dealt before, or whatever else binds them to the old business, and so to secure their custom for himself. * * * It is true that those who were former customers of the firm to which he belonged may of their own accord transfer their custom to him; but this incidental advantage is unavoidable and does not result from any act of his. * * * But when he specifically and directly appeals to those who were customers of the previous firm he seeks to take advantage of the connection previously formed by his old firm and of the knowledge of that connection which he has previously acquired to take that which constitutes the good will away from the persons to whom it has been sold and to restore it to himself." Lord Herschell deemed it immaterial to consider whether, on the sale of a good will, "the obligation on the part of the vendor to refrain from canvassing the customers is to be regarded as based on the principle that he is not entitled to depreciate that which he has sold or as arising from an implied contract to abstain from any act intended to deprive the purchaser of that which has been sold to him and to restore it to the vendor." He was satisfied that the obligation existed and that it ought to be enforced by a court of equity.

Lord Macnaghten, in his opinion in Trego v. Hunt, thus summarizes the various ways in which the doctrine of Labouchere v. Dawson may be supported: "A man may not derogate from his own grant; the vendor is not at liberty to destroy or depreciate the thing which he has sold; there is an implied covenant, on the sale of good will, that the vendor does not solicit the custom which he has parted with; it would be a fraud on the contract to do so. These, as it seems to me, are only different terms and glimpses of a proposition which I take to be elementary. It is not right to profess and to purport to sell that which you do not mean the purchaser to have; it is not an honest thing to pocket the price and then to recapture the subject of sale; to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own."

The good will, which the owner thereof parts with in invitum, as in bankruptcy proceedings or by operation of law, as in the liquidation of a partnership by the lapse of time or its termination pursuant to the articles of copartnership, is a lesser property than the good will which is the subject of a voluntary sale and transfer by the owner for a valuable consideration. In the first class of cases the former owner remains under no legal obligation restricting competition on his part in the slightest degree; in the second class of cases the former owner, by his voluntary act of sale, has excluded himself from competing with the purchaser of the good will to the extent of having impliedly agreed that he will not solicit trade from customers of the old business. To this extent this good will is a more valuable property than the good will of a business which goes to a trustee in bankruptcy or a receiver or survivor of a partnership in liquidation. The good will which is the subject of a voluntary sale is, therefore, a different thing from the good will which the owner parts with perforce or under compulsion. This is a necessary implication from the principle upon which Labouchere v. Dawson and Trego v. Hunt were decided.

The necessity for the distinction which the law thus makes may readily be illustrated. If the sale of the good will upon the ordinary dissolution and liquidation of a partnership imported the same obligation as that which arises upon a voluntary sale, not to solicit trade from customers of the old firm, merchants who had been in trade as partners of undesirable associates would constantly find themselves, by the mere fact of the dissolution of the firm they desired to leave, disqualified from seeking future business from those who might be their most desirable customers. Such a restriction should be imposed and is imposed only when the transfer of the good will is a free, affirmative act, and is made under such circumstances that it would be bad faith on the part of the vendor to avail himself as against the vendee of any special knowledge or advantage derived by him from the business whose good will he has voluntarily sold.

Courts of high repute in this country have adopted the same view as that of the House of Lords in Trego v. Hunt in reference to the right of a voluntary assignor of the good will of a business to solicit trade from old customers. It obtains in Massachusetts, New Jersey, Michigan, Rhode Island, Illinois, and Pennsylvania. Hutchinson v. Nay, 187 Mass. 262, 72 N. E. 974, 68 L. R. A. 186, 105 Am. St. Rep. 390; Newark Coal Co. v. Spangler, 54 N. J. Eq. 354, 34 Atl. 932; Myers v. Kalamazoo Buggy Co., 54 Mich. 215, 19 N. W. 961, 20 N. W. 545, 52 Am. Rep. 811; Zanturjian v. Boornazian, 25 R. I.

151, 55 Atl. 199; Ranft v. Reimers, 200 Ill. 386, 65 N. E. 720, 60 L. R. A. 291; Wentzel v. Barbin, 189 Pa. 502, 42 Atl. 44. Connecticut seems to be the only state in which a court of last resort has entertained a contrary view. Cottrell v. Babcock P. P. M. Co., 54 Conn. 122, 6 Atl. 791. The rule thus sanctioned in England and in so many states of the Union commands our approval, and we feel bound to give it our assent in answering the questions certified to us in the present case.

CULLEN, C. J., and HAIGHT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur.

NOTE.—*Good Will Carries With it the Incidents Which Made the Business Valuable.*—It is quite generally held—indeed there is little, if any, authority *contra*, that in the absence of an express covenant, a sale with good will does not mean the vendor may not engage in a competitive business. Williams v. Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161; Bassett v. Percival, 87 Mass. (5 Allen) 345; Jackson v. Byrnes, 103 Tenn. 698, 54 S. W. 984; McMartin v. Stevens, 26 Nash. 576, 67 Pac. 216; White v. Trowbridge, 216 Pa. 11, 64 Atl. 862.

But "good will" is a term which embraces, that which the parties may be supposed to have intended it should embrace. Thus in Gordon v. Knott, 199 Mass. 173, 85 N. E. 184, 19 L. R. A., N. S. 762, plaintiff conducted a business in London for 12 years, handling there the rubber goods of defendant, the latter merely consigning the goods to plaintiff as its agent. At the end of the above period, plaintiff assigned to one Knott all the good will of the business and all the plant, materials, stock in trade, book debts and assets. Possession being taken, the defendant conducted its business through Knott as its agent. Plaintiff sued for an accounting under a contract for the transfer of a sales agency. It was contended by defendant that the business was its own; the reputation of the goods belonged to it and so the list of customers and there was nothing left for transfer by plaintiff as good will but his personal knowledge and his acquaintance with traveling salesmen and probable customers. The court said: "It well might have been within the contemplation of both parties that he could secure an ample supply of such merchandise from other sources, and become so troublesome a competitor * * * as to make all the difference between a profit and a loss to the defendant in the prosecution of that business. Apparently there was nothing to prevent the plaintiff from taking that course; and this knowledge, experience, acquaintance and ability of his might well be found, as apparently it was found by the single justice, to constitute what the parties to this agreement called the good will." Then the court says: "After the transfer he could not derogate from his grant by engaging in a competing business of the same kind, selling the same goods and endeavoring to deal with the same customers. * * * The case at bar is peculiarly one in which the plaintiff could not set up a competing business without derogating from his grant." Then the court distinguishes this from other cases in which mere transfer of good will does not prevent competition, generally speaking

And so from the nature of what is sold, competition is impliedly forbidden. Thus where a person sells "all his right, title and good will" to a certain paper route, he excludes himself from all right to sell papers in the territory that route has served. Wentigel v. Borbin, 189 Pa. St. 502, 42 Atl. 44.

And as it is that the good will pertains to what the business earns from location (Griffith v. Kirley, 189 Mass. 522, 76 N. E. 201), and the probability that customers will continue to trade there (Williams v. Favrand, supra), an agreement for a specified term not to "do anything that will conflict with" the business transferred is equivalent to an express covenant not to engage in direct competitive business. Hitchcock v. Anthony, 83 Fed. 779, 28 C. C. A. 80.

The same theory that protects location will protect against misleading devices to take away customers of the business and not those seeking alone to patronize the seller. Thus to establish a newspaper of the same name as that sold or which claims to be its successor is not permissible. Lawrence v. Times Printing Co., 90 Fed. 24. Neither can the seller canvass among the old customers, nor where a large amount of business was done over the telephone, have his old number. Ranft v. Reimers, 200 Ill. 386, 65 N. E. 720, 60 L. R. A. 291; Zanturjian v. Boomazian, 25 R. I. 151, 55 Atl. 199.

This principle is applied to the case of one partner selling out his interest in the firm. Althen v. Vreeland (N. J. Eq.), 36 Atl. 479; Acker M. & C. Co. v. McGaw, 144 Fed. 864. There is, however, authority *contra*. Fish Bros. Wagon Co. v. LaBelle W. Works, 82 Wis. 546, 52 N. W. 595, 16 L. R. A. 453, 33 Am. St. Rep. 72; Williams v. Farrand, *supra*.

There is a distinction also as to whether the sale is a voluntary or involuntary sale, the latter rarely barring a partner from engaging in a competitive business.

Thus in Hutchinson v. Nay, 187 Mass. 262, 72 N. E. 974, 68 L. R. A. 186, 105 Am. St. Rep. 390, the sale was in a dissolution proceeding, good will being sold as part of firm's assets, the sale being forced on surviving partner by administrator of deceased partner. It is said: "He is not bound to retire from business as a sole trader elects to do by voluntarily selling his good will." See also Moore v. Rawson, 199 Mass. 493, 85 N. E. 586.

So where there is a sale for the benefit of creditors it was held the purchaser of the good will could not even enjoin one partner from again engaging in the same line of business under the old firm name. Iowa Seed Co. v. Dorr, 70 Iowa 481, 30 N. W. 866, 59 Am. Rep. 446.

The principal case has discussed the cases on this subject quite elaborately and this note merely illustrates a little more fully what is there said, and serving only to point out that the presumption about the meaning of the term "good will" is not perhaps a very strong one, and enforcing the idea that though good will does pertain to the business, independently of the personality, the business sold must carry with its good will its advantageous incidents.

C.

CORAM NON JUDICE.

LIABILITY OF BRIDEGROOM.

A very peculiar case arose in the Court of the Civil Justice of the City of Richmond, Virginia, on February 8th, 1911.

One Swann, a colored man, was engaged to be married to a young woman of his own race, who was by occupation a school teacher.

In anticipation of her approaching marriage the young woman spent sums of money in purchasing a wedding dress, other wearing apparel and certain articles of personal adornment; and, in addition thereto bought fittings for the room which she and Swann were to occupy after their marriage. The expenditures would not have been made except in anticipation of the marriage and were only such as were customary to her station in life. Swann shortly before the time set for his marriage committed suicide. Certain of the articles thus purchased, and paid for by the prospective bride, could be used by her, or were given away by her; other of the articles were useless to her and could have been used only in case of her marriage.

A warrant was brought before the Civil Justice of the City of Richmond, Virginia, against Swann's estate for the recovery of the money spent. The bride to be was offered as a witness in the case. The court held:

1. "That the warrant would lie, because Swann by committing suicide caused by his own act the failure of the consummation of his engagement of marriage.

2. "Recovery by claimant was limited to such articles as were rendered worthless to claimant because the marriage did not take place.

3. "Claimant was offered as witness and her testimony was admitted, notwithstanding the fact that Swann was dead, because by his own act he had caused the violation of the contract and his estate was estopped from claiming the exception in the statute that where one party to a contract is dead, the other cannot testify. It cannot be supposed that the legislature intended that the deliberate and wicked act of decedent should raise a statutory bar to protect his estate by rendering plaintiff incapable of testifying."

This case should discourage bridegrooms from thinking they can escape some unfortunate contract of marriage by shuffling off this mortal coil. But it seems, on the other hand, the irony of fate that a dead bridegroom should have to pay the expenses of nuptials which he never celebrated and never enjoyed.

CORRESPONDENCE.

DEFENSE ARISING AFTER SUIT BROUGHT.

Editor Central Law Journal:

I note with interest, in 72 Cent. Law Journal 114, your discussion as to the burden of proof in actions upon open accounts.

In this line there is an interesting decision by the Supreme Court of Montana, reported at page 849 of 111 Pac. Rep. The case is Isman v. Altenbrand.

It is there held in an action upon a guaranty of rent, that after the plaintiff has once proved the non-payment the burden is thereafter upon the defendant to show payment. In this case there were two trials. The entire proof on the part of the plaintiff as to non-payment by the principal debtor was by deposition made March 3, 1909. The second trial was in October, 1909, and the only proof of non-payment at the second trial was by the deposition taken eight months previously.

Upon the appeal it was contended on behalf of the guarantor that the burden of proof of non-payment was upon the plaintiff up to last trial; that the fact of non-payment was a matter peculiarly within the knowledge of the principal debtor and the creditor and that the guarantor could have no knowledge of it. It was further contended that if proof of non-payment at the time of the taking of the deposition, eight months before the second trial, was sufficient to establish plaintiff's case upon the second trial, such a ruling opens the door for collusion and fraud between the principal debtor and the creditor to the undoing of the guarantor. The Court says that any other rule would compel the plaintiff to make proof of non-payment up to the very day of the trial. It was not contended that a secondary liability of the kind under consideration is such a one as comes within the presumption "that a thing once proved to exist is presumed to continue as long as is usual with things of that nature," nor that any of the presumptions relative to the non-payment of negotiable instruments attached. On the other hand it was admitted that between March 3, 1909 and October 6, 1909, the principal debtor might have paid the creditor and the guarantor have no knowledge of the payment, under an arrangement, say, that if the creditor recovered from the guarantor, as he did in this case, he should reimburse the principal debtor. Having proved by his deposition on March 3 that he had not been paid, and that being sufficient for all purposes under the ruling of the Court, the creditor might make such arrangements with the principal debtor as might be mutually agreeable, with no danger of detection and in no fear of any unpleasant visitation under the law; for what he stated under oath on March 3 was undoubtedly the truth and he made no contrary statement in the meantime.

The ruling of the Court is based upon no authority—there apparently being none to support it—and I should like to know if it appeals to you as sound in principle.

Yours truly,

Belgrade Mont. WALTER AITKEN.

NOTE.—It seems to us that the court was clearly right in its ruling. It is on this theory, that the plea puis darrein continuance has received recognition. It means as has been frequently held that where matter of defense arises after the commencement of the suit and after issue joined, it must be pleaded by a plea puis darrein continuance. Many cases to this are cited in 39 Century Digest, page 2171. If one has to do this then the corollary is that it is only necessary to make out a prima facie case up to the joining of issue.

We see no hardship in applying this rule in such a case as is inquired about, because the presumption is that both the principal and guarantor are adversary parties to the creditor, and that they are friendly with each other. The

same opportunity for fraud existed before the date the deposition applied to as afterwards or even before the obligation guaranteed matured. It could have been collusively agreed that the principal need not pay and that the guarantor alone would be pursued.—Editor.

CONSTITUTIONALITY OF RULE EXCLUDING ATHEISTS AS WITNESSES.

Editor Central Law Journal:

In the Journal for January 13th inst., you have a very timely article on the "Constitutionality of the Rule Excluding Atheists as Witnesses," which is sound in its reasoning. What I complain of is that your contributor says Alabama is one of the states that adheres to that rule.

Our constitution, section 3, provides that: "The civil rights, privileges and capacities of any citizen shall not be in any manner affected by his religious principles."

Our code provides for and defines the competency of witnesses in all cases; see sections 4007-4018, both inclusive, and you will search them in vain for the rule you attribute to us. If we had such a statute, it would be repugnant to our constitution. No such rule exists in this state.

F. S. FERGUSON.

Birmingham, Ala.

BOOK REVIEWS.

BLACK'S DICTIONARY OF LAW. SECOND EDITION.

This edition follows that of 1891, of which it constitutes a thorough revision. Many of the definitions of the prior work have been revised and expanded, and the new uses and meanings of terms are shown. Investigation has discovered also many old terms of the law which had been overlooked, and there have been added many new titles.

Nevertheless, the bulk of the volume has not been greatly added to, but it has required a system of grouping compound and descriptive terms and phrases under a main heading or title, from which they are respectively derived, in itself a very important matter, assisting to an accurate understanding both of the stem and branches that are defined.

The definitions are of terms and phases both of American and English jurisprudence, ancient and modern. There are also included the principal terms in international, constitutional, ecclesiastical and commercial law, medical jurisprudence, and there are also various select titles from Roman, Scotch, French, Spanish and Mexican law, along with a collection of legal maxims.

In decisions the author has pursued the elective plan, rather than promiscuous citation, and has preferred the cases in which the history of a word or phrase is reviewed and cases which themselves cite other cases. This is wise, because in the abundance of cases on almost any subject selection should be the rule.

This edition is from the press of West Publishing Co., 1910, and is up to the standard of attractiveness maintained by that company.

THE NATIONAL BANK ACT ANNOTATED 4TH EDITION.

This work in one volume is by Prof. Albert S. Bolles, Lecturer on Commercial Law and Banking in Haverford College, and aims to present the National Banking Act and its judicial meaning. It professes to give all the cases, which pass upon questions raised under the National Banking Act, whether they concern taxation, duties and liabilities of directors, the rights and liabilities of shareholders, criminal prosecutions, the limit of state law, criminal or other, regarding National banks and their officers, and whatsoever else concerns the National banking act.

The author claims thus to combine the features of a treatise and a digest on the subject of national banking and to place the users of the work "in full possession of all the national banking law existing at the present time."

The style of the text is clear, the arrangement of the work practical, its typography excellent and altogether it seems a very usable practical work.

The volume is bound in law buckram and its publishers are Geo. T. Bissell Co., 724 Sansom St., Philadelphia, 1910.

HUMOR OF THE LAW.

An esteemed subscriber in North Dakota writes us that he recently began a suit to foreclose a mortgage and as the law required made the original mortgagor, who had subsequently transferred his interest in the property, a party.

The original mortgagor had died but his son saw the advertisement and became indignant at what he supposed was an insult to his deceased father's memory and immediately sat down and wrote this torrid epistle:

Dear Sirs. I sean in the Times Record of Valley City that their was to be a foreclosure sale on O—— B—— wife's land. But you fellows are badly misstaken their, Because my father sold that land in the spring of 1910, and to that my father died in December and that he didnt have any thing to do with it. yous will have to prefer to J. E.—— and H. O.——. Because is them fellows that Bought the land from us. You fellows take that name off the papers and put the name that is suposed to be their, and I want to see it done too. I want yous to take notice to this right away and no more of it either.

truly Yours,

O.—— B.——, Jr.

Hon. J. H. Arrington appealed a case from the Circuit Court of Lawrence County, Mississippi, to the Supreme Court, and confidently expected a reversal. It was affirmed, and when the mandate arrived it had indorsed upon it merely the words: "Per Curiam-Affirmed."

"John," he was asked "What does 'Per Curiam' mean?" "Well," he said, "I have examined my words and phrases, law dictionaries, encyclopaedias, etc., and the best that I can make out of it is that they mean that the lawyer who appealed this case is a —— fool."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Assault and Battery**—Resisting Arrest.—One assaulting an officer attempting to arrest him held not entitled to justify his act on the ground that the officer had not informed him of his intent to arrest and for what offense the arrest was about to be made.—Robison v. United States, Okl., 111 Pac. 984.

2. **Bailment**—Nature and Element.—For the relation of bailor and bailee to arise, specific property must be delivered to the bailee for a specific purpose.—Northcutt v. State, Tex., 131 S. W. 1128.

3. **Bankruptcy**—Authority of Receiver.—Implied power of receiver in bankruptcy to purchase on credit and to borrow money held to exist only in absence of express power conferred by court.—In re C. M. Burkhalter & Co., D. C., 182 Fed. 353.

4.——Contempt.—Bankr. Act July 1, 1898, empowers the court to punish witnesses for perjury committed in bankruptcy proceedings before a referee.—In re Bronstein, D. C., 182 Fed. 349.

5.——Equitable Rights in Land.—A purchaser of land by parol, who had improved it, held to have an equity therein which may be subjected to the payment of his debts.—Overcast v. Lawrence, Ky., 131 S. W. 1029.

6.——Fraudulent Conveyances.—A bankrupt's trustee, suing to set aside a fraudulent conveyance, need not negative a cause of action in creditors, nor prove title in them, nor that there were insufficient assets to pay all claims filed against the estate.—Entwisle v. Cohen, 125 N. Y. Supp. 935.

7.——Provable Claims.——A judgment recovered against a trustee in bankruptcy in an action commenced more than a year after the adjudication on a claim which had not been filed held not provable against the estate.—In re Havens, D. C., 182 Fed. 367.

8.——Vacation of Liens.—Bankruptcy proceedings did not divest a judgment lien where the bankrupt's property never passed to a trustee.—Miller v. Barto, Ill., 93 N. E. 140.

9. **Banks and Banking**—Deposit of Check for Collection.—Where one deposited a check with a bank for collection, held, that the depositor could not recover against the subagent of the bank for negligence resulting in loss.—Martin v. Hibernia Bank & Trust Co., La., 53 So. 572.

10.——Power of President.—Unless specially authorized by the board of directors, the president or a director of a bank is not legally authorized to close the bank or to prevent the reception of deposits by the bank.—Ex parte Smith, Nev., 111 Pac. 930.

11. **Benefit Societies**—Management of Order.—The courts will not interfere with the internal policy of a fraternal benefit association, whether incorporated or not, unless some valuable or property right is involved.—Lone Star Lodge No. 1935, Knights and Ladies of Honor v. Cole, Tex., 131 S. W. 1180.

12. **Bills and Notes**—Attorney's Fees.—The attorney's fee stipulated for in a note will be assumed to be reasonable, in absence of a contrary showing, and allowed without proof that it was charged and paid or agreed to be paid.—Utah Nat. Bank of Salt Lake City v. Nelson, Utah, 111 Pac. 907.

13.——Bona Fide Holder.—To make one a holder in due course of a note payable to order, it must have been indorsed, and without indorsements it is subject to any valid defense by the maker.—Woods v. Finley, N. C., 69 S. E. 502.

14.——Necessity for Presentment.—Presentment of a note for payment, unless dispensed with or excused, is necessary to charge an indorser.—Worley v. Johnson, Fla., 53 So. 543.

15.——Presumption of Ownership.—Presumption of ownership of a promissory note by a holder in possession is indulged, until overcome by contrary proof under proper pleading.—Callahan v. Louisville Dry Goods Co., Ky., 131 S. W. 995.

16. **Carriers**—Carriage of Freight.—An initial carrier held liable for loss of property on a connecting line under Interstate Commerce Act.—International Watch Co. v. Delaware, L. & W. R. Co., N. J., 78 Atl. 49.

17.——Carriage of Goods.—Where the shipper accompanies the shipment and undertakes to perform the duties required of the carrier by contract, the burden is on the shipper to show, in the first instance, that any loss or injury to the freight was not through his fault.—Winn v. American Express Co., Iowa, 128 N. W. 663.

18.——Damage to Goods.—A shipper's acceptance of payment and his giving of indemnity to carriers joined with the initial carrier in an action for damages, under Act June 29, 1906, held to estop the shipper from recovery against any of the defendants, where the indemnified companies actually caused the damage.—Carlton Produce Co. v. Velasco, B. & N. Ry. Co., Tex., 131 S. W. 1187.

19. **Chattel Mortgages**—Ownership of Property.—Where property previously held under the name of a corporation, promoted by the only party interested, was mortgaged by the promoter as his individual property, the nominal proprietorship of the corporation thereby ceased, and the mortgagee was protected by the change in the status of the property.—Fairbanks, Morse & Co. v. Coulson Stock Food Co., Mo., 131 S. W. 894.

20. **Constitutional Law**—Ex Post Facto Laws.—A law curtailing the number of peremptory challenges held not ex post facto, where enacted after commission of the offense charged.—Harris v. United States, Okl., 111 Pac. 982.

21.——Right to Wear Religous Garb.—Right of an individual to clothe himself in whatever garb his taste, tenets of his sect, or even his religious sentiment may dictate is not more absolute than his right to give utterance to his sentiment and may be restrained by statute.—Commonwealth v. Herr, Pa., 78 Atl. 68.

22.——Security for Existing Debts.—It is not within the power of the Legislature to compel a debtor to give security for an existing debt.—Russo v. Illinois Surety Co., 125 N. Y. Supp. 991.

23. **Contempt**—Violation of Court Order.—The failure to pay money into court as directed by an order of court is a constructive or indirect contempt.—Zobel v. People, Colo., 111 Pac. 846.

24. **Contracts** — Consideration. — Any act which is a benefit to one party to a contract or a disadvantage to the other party is a valuable consideration.—People v. Commercial Life Ins. Co., Ill., 93 N. E. 90.

25.——Construction.—In construing a contract, when the purpose designed to be accomplished is ascertained, the meaning given to the language used should comport with the intended purpose.—Brown v. Beckwith, Fla., 53 So. 542.

26.——Estoppel.—Defendant publishing company which offered a prize for the largest number of subscriptions secured for its paper, providing the subscriptions were mailed within a certain time, held estopped from denying plaintiff credit for certain remittances as of a certain date by receiving and accepting such remittances.—Barker v. Lewis Pub. Co., Mo., 131 S. W. 924.

27.——Parties Bound.—Where a building contractor signed the name of two other men to the contract, because his own name was not mentioned therein, the contract was as binding on him as if he had signed his own name.—Smith v. Russell, 125 N. Y. Supp. 952.

28.——Wrongful Forfeiture.—A contractor, having wrongfully terminated a subcontract and completed the work, could not counterclaim, against a recovery for the work done, the cost of completion.—Standard Const. Co. v. Jeunesse, Ky., 131 S. W. 1028.

29. **Corporations**—Insolvency.—Creditors of an insolvent corporation occupy such a position that they may object to a claim interposed by a creditor seeking to participate as a lienor in the assets of the corporation.—Voightman & Co. v. Southern Ry. Co., Tenn., 131 S. W. 982.

30.——Inspection of Books.—Majority of directors of corporation held not entitled to deny third director a right to examine books of a corporation because he is a mere dummy—People v. Bonwit Bros., 125 N. Y. Supp. 958.

31.——Ultra Vires Contracts.—Where a corporation has received the benefits of an executed contract, it cannot escape liability thereon on the ground of its being ultra vires, where the contract was not malum in se or malum prohibitum.—McQuaide v. Enterprise Brewing Co., Cal., 111 Pac. 927.

32.——Validity of Statute.—The Legislature has power to make a corporation organized under the laws of another state a corporation of this state in regard to property and acts within its territory or jurisdiction.—Stonega Coke & Coal Co. v. Southern Steel Co., Tenn., 131 S. W. 988.

33. **Criminal Evdence**—Testimony of Accomplice.—A conviction may be had upon the uncorroborated testimony of an accomplice, where it satisfies the jury of accused's guilt beyond a reasonable doubt.—Knight v. State, Fla., 53 So. 541.

34.——Admission of Evidence.—That witnesses in a prosecution for violating an injunction restraining the maintenance of a liquor nuisance were detectives would not warrant the disregarding of their testimony.—State v. Winbauer, N. D., 128 N. W. 679.

35.——Illegal Sale of Liquor.—The state is not precluded from prosecuting one for illegally selling intoxcating liquor because the purchase was made by an officer for the purpose of instituting prosecution thereon.—Taggert v. State, Okl., 111 Pac. 959.

36.——Pleading.—A variance is not ground for arrest of judgment, but must be brought to the trial court's attention by objection to the introduction of the evidence.—State v. Burk, Mo., 131 S. W. 883.

37.——Weight of Evidence.—That witnesses for the state contradict one another does not legally prevent the jury from basing a verdict on the testimony of such of them as they believe.—Holland v. State, Ga., 69 S. E. 591.

38.——Violation of Prohibition Law.—The state is not estopped from prosecuting a violation of the prohibition law because the purchase of the liquor was made at the instance of the prosecuting attorney.—Moss v. State, Okl., 111 Pac. 950.

39. **Death**—Liability.—Parents of an insane son held not liable for a homicide committed by him.—Bollinger v. Rader, N. C., 69 S. E. 497.

40.——Presumptions as to Suicide.—There is no presumption of law that decedent for whose death an action is brought committed suicide, and the presumption is that it was without design.—Voelker v. Hill-O'Meara Const. Co., Mo., 131 S. W. 907.

41. **Deeds**—Attempt at Testamentary Disposition.—An instrument held inoperative as a deed, being an attempt to bring about results which could be accomplished only by a will.—Evans v. Evans, 125 N. Y. Supp. 960.

42.——Constructive Delivery.—Where a mother executes a deed to her minor child and retains possession of it during the child's minority, such possession held to be the possession of the minor and to amount to a contructive delivery of the deed.—Wadsworth v. Vinyard, Tex., 131 S. W. 1171.

43.——Presumptions.—Where undisputed possession has been had under a deed for 60 years, its recitals that all the heirs of the patentee of the land joined in its execution are presumed to be true.—Steele v. Jackson, Ky., 131 S. W. 1032.

44. **Descent and Distribution**—Liabilities. — An heir who, pending a suit for partition, conveys all his interest to another heir who holds a vendor's lien note of the ancestor is relieved from liability by reason of the lien on his pro rata share.—Thomas v. Thomas, Tex., 131 S. W. 1164.

45. **Divorce**—Alimony.—The property a husband acquired after his obtainng by publication a divorce in a sister state held subject to his wife's claim for alimony.—Toncray v. Toncray, Tenn. 131 S. W. 977.

46.——Alimony.—While it is true that alimony does not follow the wife as of course, yet in the discretion of the court it may be awarded, where the divorce is given for her fault.—Vigil v. Vigil, Colo., 111 Pac. 833.

47.——Grounds.—Conviction of an offense involving moral turpitude, followed by a sentence of imprisonment in penitentiary for two years or longer, held ground for divorce, notwithstanding a pardon granted after the sentence was imposed.—Wood v. Wood, Ga., 69 S. E. 549.

48.——Grounds.—Untrue charges by a husband of unchastity and infidelity against his wife constitute cruel treatment entitling the wife to a divorce.—Aycock v. Aycock, Tex., 131 S. W. 1139.

49. **Drunkards**—Head of Family.—While a husband and wife are living together, the husband is the head of the family, though the wife pays the rent and supports the husband.—Patterson v. State, Ga., 69 S. E. 591.

50. **Easements**—Permissive Use.—If a way is used as a mere privilege by the owner's permission, no presumption of grant arises.—Louisville & N. R. Co. v. Hagan, Ky., 131 S. W. 1018.

51. **Embezzlement**—Interest in Fund.—Where accused had an interest in certain rents he was employed to collect by prosecutrix, he could not be convicted of larceny thereof.—People v. O'Farrell, Ill., 93 N. E. 136.

52. **Eminent Domain**—Deed from Defendant. —Where condemnation is had for a public purpose, the person whose property is condenmed is not required to convey to the condemnor, but may stand on the statutory regulation as to the extent of the estate acquired and the reversion in case of abandonment.—City of Atlanta v. Jones, Ga., 69 S. E. 571.

53.——Street Railroad Franchise.—Sale of franchise to a corporation to operate a car system over a public road held not a deprivation of property of the abutting owners within the constitutional prohibition.—Friscoville Realty Co. v. Police Jury of Parish of St. Bernard, La., 53 So. 378.

54. **Equity**—Jurisdiction of the Person. — Where a court of equity has jurisdiction of the person of a principal defendant, it may render any appropriate decree acting directly upon the person, although the subject-matter may be without the jurisdiction.—Newman v. Shreve, Pa., 78 Atl. 79.

55.——Limitations.—A court of equity in a case in which its jurisdiction is exclusive is not bound by limitations, applicable to actions at law, but may restrict or enlarge them according to the peculiar circumstances of the case.—Evans v. Moore, Ill., 93 N. E. 118.

56. **Estoppel**—After Acquired Title. — Title subsequently acquired by grantors passes to their grantees by operation of the covenant of title in their warranty deed.—Bird v. Cross, Tenn., 131 S. W. 974.

57. **Evidence** — Declarations by Grantor. — Declarations of a grantor, made 20 years after making a deed, concerning the description and location of the land granted, cannot affect the grantee's title.—Read v. Gilliam, Ky., 131 S. W. 1034.

58. **Exchange of Property**—Performance. — A party contracting to convey land in exchange of other land and to furnish a good title thereto does not tender a performance by tendering a bond conditioned on his securing the release of incumbrances on the land.—Carlisle v. Green, Tex., 131 S. W. 1140.

59. **Executors and Administrators**—Death of Partner.—On the death of a partner in a private bank, held, that title to the assets passed to the surviving partner as such, and not as trustee for the creditors, so that on the death of the survivor his executor was entitled to administer the estate.—Dickinson v. Powers, 125 N. Y. Supp. 949.

60. **Federal Courts**—Foreign or Alien Corporation.—A foreign or alien corporation held subject to suit for injuries to a passenger, who was a citizen of New Jersey, in a federal Circuit Court sitting in New York, where service of process was obtained.—Jarowski v. Hamburg-American Packet Co., C. C. A., 182 Fed. 320.

61.——Interstate Railroads.—Institution and maintenance of suits in a state court against the receivers of an interstate railway company appointed by a federal court does not interfere with the railroad's operation or the performance of its duties as an interstate carrier.—Dale v. Smith, C. C., 182 Fed. 360.

62.——State Decisions.—Federal courts will follow decisions of state courts as to what constitutes a water course.—Chicago, B. & Q. R. Co. v. Board of Sup'rs of Appanoose County, Iowa, 182 Fed. 291.

63. **Fire Insurance**—Iron Safe Clause. — An iron safe clause in a fire policy held only applicable to merchandise kept for resale, and not to machinery and appliances of a job printing office.—Queen of Arkansas Ins Co. v. Dillard, Ark., 131 S. W. 946.

64. **Guaranty**—Payment of Rent.—In an action on a guaranty of the payment of rent, held, that the burden was on defendant to show that the rent had been paid between the date of plaintiff's deposition showing his nonpayment taken at the first trial and the second trial.—Isman v. Altenbrand, Mont., 111 Pac. 849.

65. **Habeas Corpus**—Custody of Infants.—At common law the father has the paramount right to the custody and control of his minor children.—Porter v. Porter, Fla., 53 So. 546.

66.——Review of Judgment.—The judgments of inferior courts can be attacked by writ of habeas corpus only for such illegalities as render them void.—Ex parte Roquemore, Tex., 131 S. W. 1101.

67. **Highways**—Automobiles.—The failure of the driver of an automobile to give warning of its approach by means of a horn or other device, as required by Ky. St. may be negligence per se.—Cumberland Telephone & Telegraph Co. v. Yeiser Ky., 131 S. W. 1049.

68. **Homestead**—Exemptions.— Constitutional and statutory provisions exempting the homestead to the head of the family should be liberally construed.—Dieter v. Fraine, N. D., 128 N. W. 684.

69. **Homicide**—Presumption of Intent to Kill.—The presumption of an intent to kill from the use of a deadly weapon in the commission of a homicide does not arise, where such a weapon is used in a manner not naturally calculated to produce death.—Delk v. State, Ga., 69 S. E. 541.

70. **Husband and Wife**—Alimony.—Where a husband has sued for divorce, and his wife has been summoned to return to the matrimonial domicile, she cannot cause her husband to pay her alimony.—State v. Boettner, La., 53 So. 555.

71.——Estoppel.—The mere presence of a wife, when papers were prepared and executed by her husband assigning a claim belonging to her, would not estop her from herself enforcing the claim, if she had no knowledge at the time that her husband claimed to own it, or intended to assign it.—Hoshkowitz v. Sargoy, 125 N. Y. Supp. 913.

72.——Estoppel of Wife.—A married woman may be bound by estoppel the same as a man.—Overcast v. Lawrence Ky., 131 S. W. 1029.

73.——Separate Maintenance.—An action for separate maintenance must be based on an actual abandonment, or a refusal to support, or such neglect as amounts to a refusal.—Herrett v. Herrett, Wash., 111 Pac. 867.

74. **Indictment and Information**—Sufficiency.—The insertion of the word "of" after the word "name" in the constitutional clause for the beginning of an indictment, "In the name and by the authority of the state of Texas," held not to invalidate the indictment.—Moss v. State, Tex., 131 S. W. 1088.

75. **Injunction** — Preventive Remedy. — Although mandamus is the proper remedy to compel a public service corporation to supply a person with its commodity, yet, where it has already been supplied, injunction is the proper remedy to prevent it from being cut off.—Seaton Mountain Electric Light, Heat & Power Co. v. Idaho Springs Inv. Co., Colo., 111 Pac. 834.

76.——Property Subject to Relief.—Where an easement appurtenant to real estate is appropriated by one having no right to acquire property under the right of eminent domain, the owner of the easement held entitled to appeal to a court of equity to enjoin the appropriation.—Batchelor v. Hinkle, 125 N. Y. Supp. 929.

77. **Insane Persons**—Torts.—An insane person is liable for torts committed by him, and he is civilly liable for a homicide committed by him.—Bollinger v. Rader, N. C., 69 S. E. 497.

78. **Interstate Commerce**—Private Banks.—The business of private banking is not interstate commerce, and a state statute regulating the same is not in violation of the commerce clause of the Constitution.—Engel v. O'Malley, C. C., 182 Fed. 365.

79. **Intoxicating Liquors.**—Illegal Sale.—One consummating a sale of liquor in the state as the agent of a foreign brewing company by actually delivering the liquor to the prosecuting witness in the state is guilty of selling intoxicating liquors.—Schondel v. State, Ind., 93 N. E. 67.

80. **Landlord and Tenant**—Fraudulent Representations.—A lessee induced to sign a lease by fraudulent representations by the lessor's agent as to its contents is not estopped from alleging the fraud by his omission to read the lease within a reasonable time.—Stewart v. Fleming, Ark., 131 S. W. 955.

81.——Special Taxes.—Payment of an assessment for benefits for the widening of a street by the owner of property held not a voluntary payment so as to preclude them from recovering the amount from the lessee who had covenanted to pay all special taxes.—Pleadwell v. Missouri Glass Co., Mo., 131 S. W. 941.

82. **Larceny**—Offenses by Bailee.—Where a tenant, who is bound by his lease to sell a crop and deposit part of the proceeds in a bank to the landlord's credit, fails to do this and retains the entire proceeds, he is not guilty of larceny as a bailee.—Northcutt v. State, Tex., 131 S. W. 1128.

83. **Life Insurance**—Waiver of Payment of Premium.—An unconditional delivery to insured of a life policy stipulating that it shall not take effect until the first premium has been paid is a waiver of the prepayment of the premium.—People v. Commercial Life Ins. Co., Ill., 93 N. E. 90.

84. **Mandamus**—Nature of Proceedings.—Mandamus is a proceeding having the nature and attributes of a civil action.—State ex rel. First Nat. Bank v. Bourne, Mo., 131 S. W. 896.

85. **Master and Servant** — Assumption of Risk.—An explosion in the furnace of a boiler by which a servant was injured held obvious and arising from natural laws, so that his employer was not bound to warn him of such danger.—Props v. Washington Pully & Mfg. Co., Wash., 111 Pac. 888.

86.——Duty of Master.—The duty of a master to exercise reasonable care to furnish a servant a reasonably safe place held not assignable, and he is liable for the negligence of a boss in charge of men doing a particular work.—Yellow Poplar Lumber Co. v. Ford, Ky., 131 S. W. 1010.

87.——Duty to Employ Competent Servants.—A master must employ a reasonably safe person, considering the nature of the work and the general safety of those required to associate with such person in the general employment.—Swift Mfg. Co. v. Phillips, Ga., 69 S. E. 585.

88.——Liability for Negligence of Servant.—A master furnishing a servant with a vehicle held liable for injuries caused by the servant's negligent use thereof.—Rudd v. Fox, Minn., 128 N. W. 675.

89.——Liability of Master.—Where an owner of a horse and carriage lent them, with his driver, to a third person, the driver held to remain the servant of the owner.—Corliss v. Keown, Mass., 93 N. E. 143.

90.——Warning Servant of Danger.—In the absence of a contrary showing, the master may assume that the servant knows the common facts of nature, which are known to persons of his age and experience.—Props v. Washington Pulley & Mfg. Co., Wash., 111 Pac. 888.

91. **Mechanic's Liens** — Judgment Against Married Woman.—The court held authorized to render a personal judgment against a wife for a balance due one furnishing materials for an improvement on her land, pursuant to a contract with her husband acting as her agent.—H. C. Behrens Lumber Co. v. Lager, S. D., 128 N. W. 698.

92.——Materialmen.—That a materialman, furnishing materials to a contractor for use in a building, furnished new material to take the place of defective materials furnished, held not to extend the time for the filing of a lien for materials.—Voightman & Co. v. Southern Ry. Co., Tenn., 131 S. W. 982.

93.——Sub-contractors.—Where a subcontractor has given to the owner of a building notice of his intent to furnish material or perform labor subsequent payment for such material or labor by the owner of the building to the contractor will not defeat the subcontractor's lien therefor.—Jones v. Baisley, Okl., 111 Pac. 942.

94. **Municipal Corporations**—Grant of Water Works Franchise.—In the absence of statutory authority, a municipality has an inherent right to give a franchise to a waterworks company.—City of Joseph v. Joseph Waterworks Co., Or., 111 Pac. 864.

95.——Public Improvements. — A municipal corporation, which establishes an original grade on a street, is not liable for injuries thereby to adjacent property.—Ewing v. City of Louisville, Ky., 131 S. W. 1016.

96.——Violation of Ordinances.—A prosecution for a violation of a municipal ordinance is a civil action and the rules of pleading applicable in cases before justices of the peace govern.—Smith v. City of New Albany, Ind., 93 N. E. 73.

97. **Names**—Idem Sonans.—Under the rule of idem sonans, votes written on the ballot for "Telix Lelue" held properly counted for "Felix Leleu."—Leleu v. Delcambre, La., 53 So. 565.

98. **Negligence** — Evidence. — Plaintiff is not required, after proving that defendant's negligence caused the injury, to prove that he was not guilty of negligence contributing to the result.—Clark v. City of Lancaster, Pa., 78 Atl. 86.

99.——Res Ipsa Loquitur.—Where the doctrine of res ipsa loquitur applies, plaintiff held not required to allege or prove the particular acts of omission or commission from which the accident complained of resulted, and the burden is on defendant to show the absence of negligence.—Lykiardopoulo v. New Orleans & C. R., Light & Power Co., La., 53 So. 575.

100. **Nuisance**—Parties Liable.—The rule that he who creates a nuisance and he who maintains it are alike responsible for its effect, without limitation of condition or time applies only to nuisance per se.—Thornton v. Dow, Wash., 111 Pac. 899.

101. **Partition**—Title to Property.—The court cannot refuse partition, because complainant's title was acquired through a judgment based on an unfounded claim.—Miller v. Barto, Ill., 93 N. E. 140.

102. **Partnerships**—Liability of Partners.—An innocent partner is liable, in an action for money had and received, for money converted to his own use by a copartner in the partnership business.—Wrynn v. Pistor, 125 N. Y. Supp. 970.

103. **Penalties**—Pleadings.—The petition in an action under a statute for a penalty imposed thereby must state facts authorizing an infliction of the penalty.—Bradshaw v. Western Union Telegraph Co., Mo., 131 S. W. 912.

104. **Perjury**—Materiality of False Testimony —In perjury, held not necessary that the alleged false testimony should bear directly on the issue.—Dickerson v. State, Wyo., 111 Pac. 857.

105. **Physicians and Surgeons**—Degree of Care Required.—In treating a patient, a physician must in general exercise that degree of skill and care which is customary to the ordinarily careful and skillful members of his profession.—Long v. Austin, N. C., 69 S. E. 500.

106. **Principal and Agent**—Authority of Agent.—The custom and usage of a business may be proved to illustrate the authority of an agent.—R. K. Hopkins & Co. v. Armour & Co., Ga., 69 S. E. 580.

107.——Existence of Relation.—An agent may testify as to whom he represented in a transaction in issue, though his declarations may not be proved by a third person.—Singer v. Guy Inv. Co., Wash., 111 Pac. 886.

108.——Undisclosed Principal. — Where an agent contracts in his own name, without disclosing his agency, he is liable to the other party as a principal, irrespective of knowledge of the fact of agency after accrual of a cause of action on the contract.—Hauser v. Layne & Bowler, Tex., 131 S. W. 1156.

109. **Principal and Surety**—Release of Surety.—A surety against whom judgment has been rendered is discharged by a subsequent judgment in favor of the principal on the same obligation.—Stolze v. United States Fidelity & Guaranty Co., Mo., 131 S. W. 915.

110.——Res Judicata.—A judgment adjudicating the nonliability of the only solvent principal on a bond is an adjudication that the sureties are not liable.—Grayson County Nat. Bank v. Wamdelohr, Tex., 131 S. W. 1168.

111. **Public Lands**—Conclusiveness of Patent. —A patent to public land issued on a declaratory statement is evidence of due performance of every prerequisite and cannot be questioned except for fraud or mistake.—Redwater Land & Canal Co. v. Reed, S. D., 128 N. W. 702.

112. **Railroads**—Duty Toward Trespassers.—A railroad company owes a trespasser no duty, except, after discovery of his peril, to exercise ordinary care to avoid injuring him.—Jones v. St. Louis, I. M. & S. Ry. Co., Ark., 131 S. W. 958.

113.——Violation of Ordinance.—A violation by a railroad company of a municipal ordinance regulating the speed of trains is negligence per se, rendering the company liable in damages to one injured as a proximate result thereof.—St. Louis Southwestern Ry. Co. of Texas v. Cambron, Tex., 131 S. W. 1130.

114. **Release**—Validity.—In absence of an adjudication of habitual drunkenness, one cannot escape liability on a contract on the ground that he was intoxicated when he executed it.—St. Louis, S. F. & T. Ry. Co. v. Bowles, Tex., 131 S. W. 1176.

115. **Removal of Causes**—Grounds of Removal.—The fact that defendants are receivers of a railroad company appointed by a federal court does not make a suit against them one involving a federal question within the removal act.—Dale v. Smith, C. C., 182 Fed. 360.

116. **Robbery**—What Constitutes.—Where a person orders others to hold up their hands, and through fear of life they do so, and he goes through their pockets and takes money, he is guilty of robbery.—Keys v. State, Tex., 131 S. W. 1068.

117. **Sales—Fraud.**—Where one was induced to purchase a piano worth $100 for $300 through the fraud of the seller's agent, the seller could recover only the market value of the piano at the time of sale.—Hall v. Decherd, Tex., 131 S. W. 1133.

118.——Order for Goods.—A buyer's letter, written after his order for goods and before the shipment of the goods by the seller, held no part of the contract, unless received and assented to by the seller.—Rice v. Pulliam, Ky., 131 S. W. 1053.

119.——Right of Rescission.—Where a seller of books on the installment plan continued to make delivery after default of the buyer, held, that it waived the default.—Edward Thompson Co. v. Vacheron, 125 N. Y. Supp. 939.

120. **Specific Performance**—Consideration. — Where a deed is based on a valuable consideration and the grantor in return attempts to convey property thereafter to be acquired, a court of equity will enforce a conveyance in a proper case.—Schapiro v. Howard, Md., 78 Atl. 58.

121. **Statutes**—Inconsistent Acts. — Where same Legislature passes two repugnant acts, the one last approved by Governor or last passed over his veto repeals repugnant provisions of other act.—Ex parte James, Okl., 111 Pac. 947.

122. **Sunday** — Power of Legislature. — It is within the power of the Legislature to require cessation of labor on certain days periodically. —Ex parte Roquemore, Tex., 131 S. W. 1101.

123. **Taxation**—Assessment.—An assessment in the name of him who appears upon the record to be the owner is good.—Lisso & Bro. v. Police Jury of Parish of Natchitoches, La., 53 So. 566.

124.——Succession Tax.—A succession tax is not a burden imposed on property, but is a privilege tax on the right of taking property from another whether by will or devolution as a matter of law.—Knox v. Emerson, Tenn., 131 S. W 972.

125. **Telegraphs and Telephones** — Damages for Failure to Deliver.—Failure to deliver a telegram held the proximate cause of damages to an insurance company from the destruction by fire of insured property.—Providence-Washington Ins. Co. v. Western Union Telegraph Co., Ill., 93 N. E. 134.

126.——Delivery Outside of City.—It is the duty of a telegraph company receiving a message to make inquiry for the addressee outside of the town at which the message is received.—Garner v. Western Union Telegraph Co., S. C., 69 S. E. 510.

127. **Trade-Marks and Trade-Names** — Infringement.—The infringement of a trade-mark, either registered or unregistered, does not necessarily involve actual fraud, or even wrongful intent, on the part of the infringer.—Gulden v. Chance, C. C. A., 182 Fed. 303.

128. **Trusts**—Parol Promise.—A mere parol promise of a grantee or devisee to hold the title to real estate in trust, unattended by any fraud in procuring the conveyance or devise, does not raise a constructive trust.—Evans v. Moore, Ill., 93 N. E. 118.

129. **Vendor and Purchaser**—Right to Rescind —Where a purchaser failed to pay the purchase price within the time prescribed, the seller could rescind and retake the land, in the absence of circumstance rendering rescission inequitable.—Lipscomb v. Fuqua, Tex., 131 S. W. 1061.

130. **Waters and Water Courses**—Riparian Rights.—Riparian rights depend on location of land, and not on the method employed to use the water.—Redwater Land & Canal Co. v. Reed, S. D., 128 N. W. 702.